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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE ALLEN HODGES,

Defendant and Appellant.

2d Crim. No. B213741
(Super. Ct. No. F413898)
(San Luis Obispo County)

George Allen Hodges appeals a judgment entered following his nolo contendere plea to inflicting corporal injury upon a cohabitant, with an admission that he inflicted great bodily injury during domestic violence. (Pen. Code, §§ 273.5, subd. (a), 12022.7, subd. (e).)¹ We conclude that the trial court did not abuse its discretion by denying Hodges a grant of probation, and affirm.

FACTS AND PROCEDURAL HISTORY

Daria Mussak was married to Hodges for seven years. Following their divorce, they maintained a business together and were friendly. On February 12, 2008, Hodges stayed with Mussak during a visit to San Luis Obispo. They planned to drive to Los Angeles together that evening.

Mussak arrived home from work later than expected that day. Hodges had been consuming alcohol and was angry that she intended to postpone the trip. He

¹ All further statutory references are to the Penal Code.

followed her to her bedroom and pushed her onto the bed. Mussak was frightened and grabbed her cell telephone. Hodges seized the telephone from her and shoved her onto the bed again. There he straddled her and choked her neck, shouting, "I will kill you. [¶] . . . [¶] . . . I will kill you and then I will kill myself." Mussak was unable to resist Hodges's body weight and soon fell unconscious.

Mussak later awoke on the bathroom floor. Hodges stated: "You are not dead. Now I need to kill you." As Mussak attempted to rise from the floor, Hodges pushed her down and she struck her head on the door. He then ordered her to draft her will. Mussak pleaded for her life, but Hodges stated that he would kill her to avoid a prison sentence. He also threatened to kill Mussak's adult daughter.

Hodges then brought Mussak fingernail clippers and ordered her to cut her nails "very short." He threw her against the bathroom wall and struck her with a towel rack. Hodges ordered Mussak to deposit her fingernail clippings into the toilet. When he left the bathroom momentarily, she escaped through a patio door to a neighboring apartment.

Neighbors summoned police officers and Mussak later received hospital treatment. She suffered from a fractured hyoid bone in her neck, bruising, swelling, a bloody ear, and an eye hemorrhage. The treating hospital physician opined that the fractured hyoid bone was consistent with strangulation.

The prosecutor charged Hodges with attempted premeditated murder, assault by force likely to produce great bodily injury, battery with serious bodily injury, elder abuse, making criminal threats, and inflicting corporal injury upon a cohabitant, each count with great bodily injury enhancements. (§§ 664, 187, subd. (a), 245, subd. (a)(1), 243, subd. (d), 368, subd. (b)(1), 422, 273.5, subd. (a), 12022.7, subds. (a), (e), 368, subd. (b)(2), 1203.09, subds. (a), (f).) Hodges pleaded nolo contendere to inflicting corporal injury upon a cohabitant (count 6), and admitted inflicting great bodily injury during an act of domestic violence. (§§ 273.5, subd. (a), 12022.7, subd. (e).)

During sentencing, the trial court denied Hodges's request for probation rather than imprisonment. The trial judge stated: "I found this to be an extremely

violent, shocking case. . . . [¶] . . . I've seen the photos of the fingernail clippings on the floor of the bathroom, . . . the only purpose for which is either to make sure she couldn't injure you in attempting to defend herself or eliminate any trace evidence, the D.N.A. [¶] . . . [¶] This is not an unusual case where probation is appropriate. . . . With regard to factors, the primary factor is that the victim . . . was particularly vulnerable, a woman, petite in size and well into her 60s, whereas the defendant is a much larger male [¶] . . . [¶] Also he was in a position of trust" The court sentenced Hodges to seven years in prison, consisting of a three-year midterm for count 6, and a four-year midterm for the great bodily injury enhancement. It imposed restitution fines, ordered victim restitution, awarded Hodges 351 days of presentence custody credits, and dismissed the remaining counts and allegations.

Hodges appeals and contends the trial court abused its discretion by denying a grant of probation.

DISCUSSION

Hodges points out that he receives treatment for depression and alcoholism and was not following his medication regime at the time he assaulted his former wife. He adds that he has a minimal criminal record, having been convicted many years ago of burglary and driving without a driver's license. Hodges asserts that Mussak did not sustain permanent injury from the attack. He describes the assault as "a single incident of violence done by an otherwise non-violent person, who was acting out under the weight of alcoholism and mental illness."

An order of probation is an act of clemency that rests within the discretion of the trial court. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.) We review the trial court's decision regarding probation for an abuse of discretion. (*Ibid.*) The burden is upon the party attacking the decision to establish that it is unreasonable or arbitrary. (*Ibid.*) "In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." (*Ibid.*) Moreover, we do

not substitute our sentencing decision for that of the trial court. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

The trial court's decision to deny probation was not unreasonable or arbitrary. The trial judge stated that he reviewed the photographs of Mussak's injuries and found the circumstances of the crime "very shocking." The judge also noted that Mussak was vulnerable due to her age and petite size and that Hodges took advantage of her trust.

In making its decision, the trial court read the probation report and the parties' sentencing memoranda. It also heard argument from the parties and received statements from Hodges and his friends. The court gave a reasoned statement explaining its decision. The trial judge stated that "but for [Mussak's] escape, [Hodges] may well have followed through and successfully murdered her." The court's sentencing explanation reflects that it considered the factors set forth in section 1202.7 regarding a grant of probation. (*Ibid.* [primary considerations in granting probation include the public safety, nature of the offense, interests of justice, including punishment, reintegration of the offender into the community, enforcement of the conditions of probation, loss to the victim and needs of the defendant].) Hodges has not met his burden of establishing that the trial court's decision is unreasonable or arbitrary.

The judgment is affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Michael L. Duffy, Judge
Superior Court County of San Luis Obispo

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Defendant and Appellant.

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